CEO 09-4 – January 28, 2009

POST-OFFICEHOLDING RESTRICTIONS

FORMER HOUSE MEMBER SERVING AS COMMUNITY COLLEGE PRESIDENT AND ON COUNCIL OF PRESIDENTS AND COMMUNICATING WITH LEGISLATURE

To: Melissa C. Miller, Executive Vice President/General Counsel, St. Johns River Community College

SUMMARY:

The Sunshine Amendment in Article II, Section 8(e), Florida Constitution, and Section 112.313(9)(a)3, Florida Statutes, prohibit a member of the Legislature from personally representing another person or entity for compensation before the Legislature for a period of two years following vacation of office. These provisions would prohibit a former member of the Florida House of Representatives currently serving as a community college president from engaging, for two years, in lobbying activities before the Legislature in behalf of the Community College. As the provisions prohibit the representation of "another person or entity," they would extend to governmental entities as well as private entities. The provisions would also prohibit the former member from lobbying in behalf of the Council of Presidents.

QUESTION 1:

Does the Sunshine Amendment to the State Constitution, Article II, Section 8(e), or Section 112.313(9)(a)3, Florida Statutes, prohibit a former House member serving as a community college president, from engaging in lobbying activities before the Legislature in behalf of the community college?

Your question is answered in the affirmative.

You write on behalf of Joe H. Pickens, a former member of the Florida House of Representatives who has recently been appointed President of the St. Johns River Community College ("College"). You advise that although the College employs a legislative liaison, the former member, as President, will "be expected to communicate with the law makers of the State about issues affecting the College and its ability to serve the citizens in our service area . . . ." You describe the former member's responsibilities with respect to legislative matters as "incidental to his other duties" in terms of time commitment and overall job responsibilities. However, you acknowledge that his communications with the Legislature "could involve matters of critical importance to the College."

Article II, Section 8(e), Florida Constitution, provides:

> No member of the legislature or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of two years following vacation of office. No member of the legislature shall personally represent another person or entity for compensation during term of office before any state agency other than judicial tribunals. Similar restrictions on other public officers and employees may be established by law. [E.S.]

Section 112.313(9)(a)3, Florida Statutes, enacted in 1991, reiterates this standard, stating:

> No member of the Legislature, appointed state officer, or statewide elected officer shall personally represent another person or entity for compensation before the government body or agency of which the individual was an officer or member for a period of 2 years following vacation of office. No member of the Legislature shall personally represent another person or entity for compensation during his or her term of office before any state agency other than judicial tribunals or in settlement negotiations after the filing of a lawsuit. [E.S.]

In CEO 81-57, after extensive analysis, we concluded that a former State Senator would be prohibited from accepting employment as Director of the Division of Hotels and Restaurants in the Department of Business Regulation within two years after leaving office, if that employment would require him to engage in lobbying activities before the Legislature in behalf of the Division. We also found there that because the prohibition only precluded the former Senator from "personally" representing the Division, he would not be prohibited from accepting such employment if the lobbying responsibilities were transferred to another person. Finally, we opined that Article II, Section 8(e) would not prohibit the former Senator from appearing before a committee or subcommittee of the Legislature at the request of the chairman as a witness or for informational purposes.[1]

In CEO 90-4, we advised that a former member of the Florida House of Representatives who served as General Counsel to the Governor would be prohibited for two years from representing the Governor before the Legislature. Again, we concluded that he would not be prohibited from appearing before legislative committees when requested to do so by the chairman, where authorized by legislative procedures. We also opined that he would not be prohibited from appearing before an individual member of the Legislature at the member's request, to the extent that he would be providing a bona fide, good faith response to a request for information on a specific subject, and that the request was not directly or indirectly solicited by him.

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[1] In CEO 81-57, we also spoke to the issue of whether a former Legislator who was *elected* to another office would be subject to the prohibition. We found that he was not, saying, "We do not believe that an elected official is representing 'another person or entity' when approaching the Legislature in the fulfillment of his public duties."

The heart of the issue in each of these opinions was, as it is here, the question of whether the prohibition of the Sunshine Amendment included governmental entities through its use of the term "another person or entity." In CEO 81-57 we determined that it did, citing a number of reasons. First, we noted that the plain language of the provision itself—"another person or entity"—did not suggest that the provision would apply only to representations of private or nongovernmental entities. Second, we observed that the term "entity" as generally defined "is broad enough to include both private and governmental organizations." We noted,

> Webster's Third New International Dictionary (1966) defines 'entity' at p. 758 as 'something that has objective or physical reality and distinctness of being and character [;] something that has a unitary and self-contained character.' An entity may be a corporate entity, a legal entity, a public entity, or a sovereign entity, among others. *See* 14A Words and Phrases, 395.

and we observed that the Legislature had implicitly recognized this by using the term "local or municipal government entity of this state," in its definition of "agency" in Section 112.312(2), Florida Statutes. Finally, we said

> It is apparent from the explanatory flyer [to the Constitutional amendment] and from the language of the Constitution that the provision was intended to prevent influence peddling and the use of public office to create opportunities for personal profit through lobbying once an official leaves office. In the context of the Legislature, the provision seeks to preserve the integrity of the legislative process by ensuring that decisions of members of the Legislature will not be made out of regard for possible employment as lobbyists. Since legislative decisions affect those in the public sector as well as those in the private sector, it would seem to be equally important that legislative decisions not be colored by regard for future lobbying opportunities in behalf of public entities.
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> In addition, the provision recognizes that the influence and expertise in legislative matters gained through a legislator's public service would give the legislator a high value and a competitive advantage within the marketplace for lobbyists. These opportunities for personal profit exist within both the private and the public sector.

We reiterated this analysis in CEO 90-4, and added:

> we are of the opinion that in the present context the Governor (or the Office of the Governor) constitutes 'another person or entity' within the contemplation of the Sunshine Amendment. In CEO 81-57 we concluded that the Sunshine Amendment's prohibition includes the representation of both

> public and private sector entities and that there are substantial reasons for not making such a distinction.
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> Although we recognize that in representing a governmental entity before the Legislature one ultimately is representing the interests of the people whom that governmental unit represents, we also recognize that public agencies represent a variety of interests, some of which compete with the interests of other public entities for the Legislature's attention. While the cities may want a particular bill to include a specific provision, the counties may not feel that such a provision is in their best interests. Although a local taxing authority may want certain powers included in its special act, the city or county in which the authority is located may have a different preference. These competing, but public, interests are represented before the Legislature, with each seeking the best representation available.
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> As expressed in Article II, Section 8, the overriding purpose of the Sunshine Amendment is to assure the people's right to secure and sustain the public trust exercised by public officials against abuse. We do not believe that the public trust is enhanced by a decision which would permit a legislator to leave the Legislature and set up a lobbying office through which he would personally represent cities, counties, or special taxing districts for a fee. In effect, we would be saying that a former legislator may lobby for whatever compensation he can obtain, so long as he limits his clientele. As noted in CEO 81-57, we believe that there is a market for public sector lobbyists as well as for those who lobby for private sector interests.
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> Clearly, your position and responsibilities as General Counsel for the Governor are very different from those of a lobbyist in private practice. However, under the criteria provided in the Sunshine Amendment, we do not believe that your situation may be distinguished from that of a former legislator who wishes to open a lobbying firm to represent only governmental agencies, in such a way as to allow you to continuously and personally engage in lobbying activities on behalf of the Governor. [E.S.]

In CEO 00-7, we spoke to the issue of whether Article II, Section 8(e), and Section 112.313(9)(a)3, prohibited the Secretary of the Department of Juvenile Justice, the Secretary of the Department of Health, the Director of the Division of Workers' Compensation, the Deputy Secretary of the Department of Elder Affairs, and the Assistant Secretary for Developmental Services, Department of Children and Families, each of whom had been members of the Legislature within the last two years, from appearing before the Legislature or legislators in the course of carrying out their official duties. We reemphasized our previous interpretation of the terms "person or entity," saying,

> We remain persuaded that this is the appropriate interpretation of the terms "person or entity." In addition to the reasons stated in the previous opinions, we note that the same phrase is used in the second sentence of Article II, Section 8(e) – the in-office ban against members of the Legislature representing "another person or entity" before State agencies other than the courts. We can think of no reason why the same phrase should not be interpreted identically when it is used in two adjacent sentences in the Constitution that were drafted by the same persons and were adopted at the same time. Further, we note that we have applied the in-office ban to representing governmental entities before Executive Branch agencies, advising in CEO 85-83 that Article II, Section 8(e), would prohibit a State Representative from personally contacting State agencies other than judicial tribunals in behalf of municipal and county governmental clients that were seeking grants, and advising in CEO 81-12 that a State Representative could not personally represent a municipal housing authority before State agencies other than judicial tribunals.

Notwithstanding our reaffirmation of the principal that the phrase "another person or entity" would include governmental entities, in CEO 00-7 we receded from CEO 81-57 and CEO 90-4, viewing the subject former members of the Legislature as continuing their public service by moving into the Executive Branch of State government, either as public officers or as full-time public employees with substantial administrative responsibilities, for whom appearing before the Legislature was an incidental responsibility of their current public position. Similarly, in CEO 00-18, we advised a member of the Florida Senate that Article II, Section 8(e), and Section 112.313(9)(a)3, did not prohibit him from appearing before or communicating with the Legislature or legislators within two years of leaving the Senate, in the course of carrying out his official duties as Executive Director of the Office of Statewide Public Guardianship.

In both CEO 00-7 and 00-18 we said that certain policy considerations, specifically that the circumstances under review did not involve the use of the officials' public service careers and contacts developed in that capacity to enrich them at the expense of the public and did not present the appearance of influence peddling or the use of public office to create opportunities for personal profit through lobbying after leaving the Legislature, militated in favor of our findings. You have indicated in conversations with our staff that the same policy considerations apply here, and we do not dispute your representation. However, upon reflection, it appears to us that these "policy considerations" are in actuality matters of fact, and that in the context of an opinion, we are ill-equipped to make such factual findings. See generally, CEO 96-21 ("in issuing an advisory opinion, we are hindered by a lack of access to information concerning all the circumstances of the situation as well as to information concerning the credibility of the individuals involved. See CEO 92-19, CEO 91-28, and CEO 82-82") and see CEO 02-3, Questions 2-5. In addition, the very same policy considerations may apply equally to any number of *private* post-officeholding employments which serve the public. The rationale of CEO 00-7 and CEO 00-18 leads to a slippery slope upon which we do not care to tread.

While we have no doubt that the former member here, like the members at issue in CEO 00-7 and CEO 00-18, is merely furthering a career of service to the public, it is clear to us that

neither "opportunities for personal profit through lobbying after leaving the Legislature" nor the *potential* for influence peddling or the appearance thereof, are exclusive to situations where the employment held after legislative service involves lobbying for private entities. In the context of conflicts of interests we have often said that the prohibition does not hinge on the personal integrity of the individual, but is rather is prophylactic in nature. CEO 81-76, CEO 97-15. The same is true here; the prohibitions of Article II, Section 8(e) and Section 112.313(9) are clearly and directly stated, and are designed as preventive measures. As we said in CEO 81-57, "the provision seeks to preserve the integrity of the legislative process by ensuring that decisions of members of the Legislature will not be made out of regard for possible employment as lobbyists. Since legislative decisions affect those in the public sector as well as those in the private sector, it would seem to be equally important that legislative decisions not be colored by regard for future lobbying opportunities in behalf of public entities." For these reasons we recede from our opinions in CEO 00-7 and CEO 00-18, and return to our position, stated in CEO 81-57 and CEO 90-4, that former members are prohibited from representing, for compensation, another person or entity, be it public or private, before the Legislature for a period of two years following their leaving office.

Accordingly, we find that Article II, Section 8(e), Florida Constitution, and Section 112.313(9)(a)3, Florida Statutes, would prohibit the former member from representing the College before the Legislature for a period of two years after leaving office.

QUESTION 2:

> Does the Sunshine Amendment to the State Constitution, Article II, Section 8(e), or Section 112.313(9)(a)3, Florida Statutes, prohibit a former House member serving as a community college president from representing the Council of Presidents?

You write that the Council of Presidents (COP) is a voluntary organization comprised of 28 community college presidents. The organization adopts a legislative agenda and speaks before the Legislature on behalf of the 28 member colleges on matters such as the funding formula and policy. You relate that as President of the College, the former member is expected to participate in the COP, and that given his background, "it is understandable that he could take an active role in communicating with the Legislature on behalf of the system if not prohibited from doing so."

As the President's responsibilities with the COP come as part of his job responsibilities as President, we cannot say they are uncompensated. Therefore, given our answer in Question 1, your question is answered in the affirmative.

ORDERED by the State of Florida Commission on Ethics meeting in public session on January 23, 2009 and **RENDERED** this 28th day of January, 2009.

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Cheryl Forchilli, *Chair*